Supreme Court, U. S.
FILED
JAN 8 1975
MICHAEL RODAK, JR., CLERK

No. 73-1596

# In the Supreme Court of the United States

OCTOBER TERM, 1974

ROBERT E. HAMPTON, CHAIRMAN OF THE UNITED STATES CIVIL SERVICE COMMISSION, ET AL., PETITIONERS

*v.*

MOW SUN WONG, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF FOR THE PETITIONERS

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1. Respondents' brief obscures the issues and rests upon premises not supported by the record. In their complaint, respondents claimed that the Civil Service Commission regulation was invalid because it limited the employment of "non-citizens" by the federal government (A. 6, 10-13; see also Resp. Br. 14, 53, 57, 64, 66).[1] In this Court respondents assert that the vice of the regulation is its effect upon "resident aliens" (*id.* at 9, 10, 14-17, n. 21, 22, 24, 25, n. 31, 30, 31, 33, 42, n. 51, 45, 46, 52, 53, 55, 58, 59, 65, 67, 68,

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[1]The court of appeals sustained that claim, although it is not entirely clear whether the group whose employment opportunities the court found to be improperly restricted consisted of all aliens (Pet. App. 14a-19a, 22a-23a) or only "resident aliens" (*id.* at 2a, 12a, 20a-23a).

70), or, at least, "permanent resident aliens" (*id.* at 2, 6, 8, 39, 54), and they further claim that "each respondent had been admitted to the United States as a permanent resident alien * * *" (*id.* at 3). This seemingly narrower characterization of the disfavored group suggests that each respondent was "lawfully admitted for permanent residence" as an "immigrant" to the United States (cf. *id.* at 39). See 8 U.S.C. 1101(a)(15), (20).

The record establishes, however, only that two of the four respondents "immigrated" to the United States (see Pet. Br. 4-6, nn. 2-5), and does not establish that any of them was "lawfully admitted for permanent residence." In fact, it does not establish that all of them were lawfully admitted, have lawfully remained here, or are even "permanent" residents in the sense of having no intention to depart.

The distinction respondents would make between aliens lawfully admitted for permanent residence and other aliens, moreover, necessarily acknowledges the propriety of some general limitation on the employment of aliens. Their real quarrel is with the balance struck, which is essentially a matter of policy judgment.

2. Respondents err in repeatedly asserting that the Commission's regulation constitutes a "total," "complete," or "blanket" ban against any employment of aliens in "the federal government" or, at least, in the competitive civil service (Resp. Br. 6, 8-10, 20, 21, n. 27, 24, 27, n. 32, 29, 30, 41, n. 50, 45, 53-55, 58, 65-68). In fact, the Commission's regulations do not totally bar the employment of aliens, even in the competitive civil service. Thus, the Commission has continued the exception established by President Roosevelt permitting employment of aliens if there is a lack of eligible citizens (Pet. Br. 80, n. 66) and has since added



two other situations in which the citizenship requirement is inapplicable (*id.* at 81-82). Respondents' real grievance is that the range of exceptions is not greater, because they do not fall within the categories of aliens eligible under the regulations.[2]

3. Respondents have misapprehended the meaning of the executive orders on which they rely in seeking to sustain the judgment of the court of appeals on grounds expressly rejected by that court. Respondents contend that the Commission's regulation violates Executive Order No. 11478, which prohibits discrimination in federal employment on grounds of race, color, religion, sex or national origin (Resp. Br. 70). That order does not supersede the Commission's regulation, but means only that when aliens within the United States are otherwise eligible for employment they cannot be discriminated against on one of the listed grounds.[3]

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[2]The exceptions to the general requirement of citizenship negate the premise of respondents' contention that, by excluding "all residents aliens from all federal employment * * * [the regulation] creates a conclusive presumption that all aliens—by virtue of that status alone— are unqualified for all federal employment" (Resp. Br. 30, n. 35).

That the Commission has not totally barred the employment of aliens in the competitive civil service is consistent with our view that the civil service laws authorize, but do not require, the use of citizenship as a qualification for such employment (Pet. Br. 72-85). Respondents' discussion of the legislative history (Resp. Br. 57-64) is wide of the mark, for it only tends to show, at best, that citizenship was not made an obligatory criterion, not that it was made an impermissible one.

[3]Respondents also err in suggesting that Executive Order No. 11478 "reaffirmed" an earlier order in 1947 eliminating the citizenship requirement (Resp. Br. 70, n. 96). Prior to 1947, the citizenship qualification, like many other substantive and procedural requirements for civil service employment, had been established by executive order, as had been the original practice (see Pet. Br. 79-80).

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 1975.

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In 1947, however, President Truman revised the Civil Service regulations so as to vest in the Commission itself substantial authority to administer the Civil Service laws, and repealed prior executive orders concerning civil service. Executive Order No. 9830, 12 Fed. Reg. 1259, 1269. The order authorized the Commission to establish standards concerning "citizenship" (12 Fed. Reg. 1262) in essentially the same terms as were used in the 1954 Executive Order upon which the current regulations are based (see Pet. Br. 3). The same day, the Commission promulgated regulations which, like the current regulations, carried forward the citizenship requirement that had previously been set forth in the executive orders. 12 Fed. Reg. 1281. In sum, rather than constituting an effort to eliminate barriers to employment of aliens, the 1947 executive order was simply part of a formal reorganization of the issuing authority, without substantive change in this regard.